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Supreme Court of the United States

..... TERM, 1965

No. 221

JOE GRAHAM POST No. 119, AMERICAN LEGION,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Joe Graham Post No. 119, American Legion, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW.

The opinion of the United States District Judge for the Southern District of the State of Mississippi, Biloxi Division, is not reported but is set out in Appendix A, pages 9-10. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 340 Fed2d 474 (1965), and is found at Appendix B.

JURISDICTION.

The opinion of the Court of Appeals was entered on Jan. 25, 1965. A timely motion for rehearing was denied March 12, 1965. The jurisdiction of this court is invoked under Section 7422, Internal Revenue Code of 1954, and Rule 19, Rules of United States Supreme Court. Although the judgment of the Court of Appeals is not a final judgment, this court has jurisdiction to review said judgment because it involved an issue fundamental to the further conduct of the case. Citing: *U. S. vs. General Motors Corporation*, 323 U.S. 373, 377; 65 Sup. Ct. 357, 89 Led 311, 318, 156 ALR 390; *Land vs. Dollar*, 330 U.S. 731, Footnote 2, Page 734, 91 Led 1209.

QUESTION PRESENTED.

Whether a taxpayer's right to seek refund in a United States District Court of taxes paid on a *fiscal year* may be stayed by the arbitrary assessment of taxes by the Deputy Commissioner upon a *calendar year*.

STATUTES INVOLVED.

The following statutory provisions are set forth in Appendix C, *infra*, pp. 17-18, Sec. 7422 (a) and Sec. 7422 (e), Internal Revenue Code.

STATEMENT.

Petitioner was granted a group exemption from Federal Income Tax in 1946. This exemption was revoked on September 13, 1961, because of its alleged engagement in

the movie theatre and cafeteria business with the general public. On March 15, 1962, it filed an untimely corporate income tax return for the *fiscal year* ending June 30, 1961, paid the full tax, penalty and interest, and filed a timely claim for refund. The Commissioner failed to act within the required period, and petitioner filed suit for refund in the United States District Court for the Southern Division of Mississippi, at Biloxi, Mississippi, on November 26, 1962. On June 28, more than one year after petitioner filed its claim for refund, and approximately seven months after suit was filed, the Commissioner asserted income tax deficiencies for the *calendar years* 1944 through December 1960 for the total amount of $118,265.66. The petitioner filed its petition with the Tax Court on August 1, 1963, and specifically objected to the assessment of taxes for January 1, 1960 through December 31, 1960, on a calendar year basis.

The government filed a motion to dismiss the refund suit on the ground that (1) the petitioner had filed a petition in the United States Tax Court contesting the tax assessment for the period of June 30, 1960, to December 31, 1960, and the District Court thus lost jurisdiction by the operation of Section 7422 (e), and (2) that since the refund suit was based upon the payment of taxes for the *fiscal year* ending June 30, 1961, the petitioner could not have, and did not pay all of the taxes for the *calendar year* 1961; and thus by the operation of *Flora v. U.S.*, 357 U.S. 63; 362 U.S. 145, the petitioner could not maintain the suit.

The trial court overruled the motion to dismiss, and on certification by the trial judge the government brought its

appeal to the Court of Appeals, which reversed, remanded and directed that the case remain on the calendar, until the Tax Court should determine the correct accounting period of petitioner. If it was determined by the Tax Court that the correct period was a fiscal year, then the trial court was authorized to try the issue; if the Tax Court determined that the correct period was a calendar year, the trial court was directed to dismiss. The trial in the District Court was thus abated until the Tax Court and any reviewing court should pass upon the question.

REASONS FOR GRANTING THE WRIT.

The election of remedies which Congress intended to afford a taxpayer by Section 7422, Internal Revenue Code, is defeated by the construction placed upon it by the Court of Appeals. A taxpayer is supposed to have a choice of either paying the full tax for the period involved and sue for refund in the District Court, or appeal from the Commissioner's assessment to the Tax Court. If, as was the case here, the taxpayer desires to do so, he may pay one year and litigate this year in District Court, and appeal the other years to Tax Court. This is frequently done where the period of time involves several years, and substantial sums of money. The advantage of this course is that the taxpayer can usually get a trial in District Court earlier, the trial is with jury, and the hearing is usually closer to the taxpayers' residence and thus more convenient. Though the judgment of the District Court is not binding upon the Tax Court, it is persuasive as to the other years in question. The net effect is to afford

the taxpayer with a simpler, quicker, and more convenient remedy than he has in Tax Court.

The effect of the Court of Appeals opinion is to stay, or delay taxpayer's right to a speedy trial in District Court until the Tax Court tries the issue of the correct accounting period. This issue could just as easily be tried in District Court, and if the taxpayer is not able to establish that he has paid the full taxes for the period involved in District Court, he cannot prevail there because of *Flora vs. U.S.*

The record in this case clearly shows that the assessment of taxes on a calendar year for the year 1960 was arbitrary and capricious. The government, in its reply brief before the Court of Appeals, states as a fact that the proper accounting period was a fiscal rather than a calendar year. The Court of Appeals asserted in its opinion that the taxpayer elected to pursue the remedy of contesting the issue in Tax Court, but the taxpayer had no choice but to raise the question there, or suffer an assessment of taxes for the calendar year of 1960 to become final, and thus jeopardize its case, and its financial condition. It was not a free choice, but a choice by compulsion. The so-called choice or election was "Hobson's choice" which was defined in *Pictorial Review Co. vs. Helvering,* 68 Fed2d 766, 769, as a choice without an alternative.

If this construction is allowed to stand unchallenged, a taxpayer's right to proceed in District Court may be frustrated by simply assessing taxes for the reverse of the accounting period for which the taxpayer is suing in Dis-

trict Court. To illustrate, if a taxpayer pays a tax on a fiscal year ending June 30, 1961, the Commissioner can, before trial of the suit, assess taxes for a calendar year 1961, and the taxpayer then has the following Hobson's choices: (1) He may appeal this assessment to Tax Court, which then sweeps him out of District Court until the Tax Court and reviewing courts determine whether the Commissioner was incorrect. (2) He may pay the disputed tax, file for refund, and litigate in District Court. He will then have paid taxes twice for the privilege of litigating one accounting period. (3) He may do nothing. The assessment becomes final, and he then must pay, even though he is litigating the question of the correct period and the amount of the tax in District Court. These are the election or choices which *U. S. vs. Joe Graham Post,* affords taxpayers. It is a perversion of Section 7422, Internal Revenue Code, which was intended to afford a taxpayer a choice with an alternative.

Certiorari should be granted in this case to remove the possibility that the election of remedies afforded by Section 7422 will be frustrated by arbitrary administrative fiat. The District Court should be given the opportunity to pass upon the question of the correct accounting year if the taxpayer meets the requirements of Section 7422, Internal Revenue Code of 1954, and *Flora vs. United States, supra.* The rights of taxpayers to speedy and adequate relief are as important as the administration of the internal revenue laws and the collection of federal revenue.

CONCLUSION.

The Petition for Writ of Certiorari should be granted in order to afford a taxpayer with a real election of remedies contemplated in Section 7422, Internal Revenue Code of 1954, and to provide for uniform administration of the Internal Revenue laws.

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By